and receipts. Subject to the amounts to be set-off against this claim, I allow his claim in the round sum of $62,500 after making a small deduction in respect of those items which were not strictly supported by documents or agreed by Mr. Tay.

In their defence the defendants claim to set-off against the plaintiffs' claim an amount of $18,466.81 arrived at my deducting the sum of $5,494.75 for which credit has been given in the plaintiffs' claim from a total indebtedness of $23,961.56 for fuel and heavy oil supplied and handling charges incurred by the defendants on the plaintiffs' account. In my opinion this claim for set-off is well grounded in that I find that the plaintiffs were responsible for payment in respect of all fuel and heavy oil used at the mine. This conclusion is supported by Mr. Tan Boon Swee's own evidence as to this estimate of $100 which he said was the daily cost of fuel at the mine including fuel and heavy oil for lorries, tippers and for the washing equipment. I accept Mr. Tay Tuan Siang's evidence that he passed on this responsibility to the plaintiffs entirely and that this was reflected in his offer of the high rate of $6.50 per ton for operations at the mine whereas the plaintiffs' operational cost was only $2.70 per ton. Although there was evidence that Mr. Tay had initialled a bill in this respect for $5,494.75 during the negotiations for settlement the negotiations broke down. I do not think that the smaller figure should be held to be binding on Mr. Tay in all the circumstances because it no doubt took into consideration the fact that the plaintiffs made other facilities available to the defendants such as the loan of their lorries on road construction works and the provision of T.D. shovels. It was on this last issue that negotiatons broke down.

I would also allow the defendants' claim to set-off against the plaintiffs' claim the sum of $38,500 advanced on behalf of the defendants by Tong Nam contractors which I find was in fact made.

I reject the defendants' claim to the sum of $19,183.50 as set out in paragraph 13 of the defence for the hire of lorries to the plaintiffs as I find no contractual basis for this charge.

I also reject the defendants' counterclaim for loss of profits which I consider somewhat far-fetched in all the circumstances and for the compensation paid by them to their lighterage contractors.

Judgment will therefore be entered for the plaintiffs in the sum of $5,533.19 with costs. The counterclaim is dismissed with costs.

Judgment for the plaintiff.

Counterclaim dismissed.

Solicitors:—*Allen & Gledhill; Hilborne, Chung & Co.*

YONG MOI & ANOR. v. ASIA INSURANCE CO. LTD.

[O.C.J. (Tan Ah Tah J.) July 27, 1963]

[Singapore — Suit No. 555 of 1962]

Insurance—Deceased passenger of car—Car driven by friend of deceased—Car borrowed by deceased—Judgment obtained under ss.7 and 12 of Civil Law Ordinance—Whether administratrix can recover whole amount under s.8(1) Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960—Whether liability covered by policy—Interpretation of policy—Civil Law Ordinance (Cap. 24), ss.7 and 12.

Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960, s.8(1).

The plaintiffs are the administratrix and co-administrator respectively of one W deceased who was killed while travelling as a passenger in a car which the deceased had borrowed and which was at the material time driven by Y. At all material times there was in force a policy of insurance issued by the defendants covering the owner or in relation to the user of the car within the scope of the policy in respect of the death or bodily injury to any person. The plaintiffs obtained judgment against Y for the sum of $2,800 under section 7 and $23,000 under section 12 of the Civil Law Ordinance, the whole amount to be paid to the Public Trustee. They now seek to recover the whole amount of the judgment from the defendants under section 8(1) of the Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960, on the ground that the liability in respect of which the judgment was obtained against Y was one which was covered by the terms of the policy which reads as follows: "3. In terms of and subject to the limitations of the indemnity which is granted by this section to the Insured the Company will indemnify any person who is driving such Motor Car on the Insured's order or with his permission provided that such person (a) is not entitled to indemnity under any other Policy (b) shall as though he were the Insured observe fulfil and be subject to the terms exceptions and conditions of this Policy in so far as they can apply (c) holds a licence to drive such Motor Car or has held and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf for holding or obtaining such a licence."

It was established as a fact that Y had complied with terms (a) and (c) of para 3 of the policy and it was established that Y was not driving on the owner's order or express permission. The question for determination was therefore whether Y was driving the car with the implied permission of the owner.

Held: it is probably impossible to state in comprehensive terms any principle which will enable it to be determined in every case whether implied permission had been given to the third person to drive the car. The determination of that question depends upon the view that is taken of the matter after consideration of the circumstances of each case. On the facts of the present case it cannot be said that the car was being driven by Y with the owners implied permission.

Case referred to:—

(1) *Lee Chong* v. *Tan Kwee Low* [1961] M.L.J. 98.

ACTION.

A. P. Godwin for the plaintiffs.

J. D. Donnelly for the defendants.

Cur. Adv. Vult.

Tan Ah Tah J.: The plaintiffs are the administratrix and co-administrator of the estate of one Woo Eng Chuan who was killed on the 6th October 1957 whilst travelling as a passenger in a motor car which was driven by one Yong Choy. The car overturned at a place between Kulai and Segamat in Johore and Woo Eng Chuan died as a result of injuries sustained by him in the accident.

Woo Eng Chuan had on the morning of the same day borrowed the car from its owner, one Ho Nee San. At all material times there was in force in relation to the user of the car a policy of insurance issued by the defendants in consideration of the payment of the premium therein stated whereby Ho Nee San was insured in respect of any liability at law for compensation, costs and expenses which might be incurred by Ho Nee San or in relation to the user of the car within the scope of the policy in respect of death or bodily injury to any person.

On the 20th February 1959 the plaintiffs brought an action in the High Court against Yong Choy and Ho Nee San to recover damages in respect of the death of Woo Eng Chuan and loss and expense incurred. The action was discontinued against Ho Nee San on the 2nd February 1961. On the 29th May 1961 judgment was entered in favour of the plaintiffs against Yong Choy for the sum of $2,800 under section 7 of the Civil Law Ordinance and the sum of $23,000 under section 12 of the said Ordinance, the latter sum to be apportioned between the first plaintiff and her two infant children as directed in the judgment, and the whole amount to be paid to the Public Trustee.

The plaintiffs now seek to recover the whole amount of the judgment from the defendants under the provisions of section 8(1) of the Motor Vehicles (Third-party Risks and Compensation) Ordinance, 1960, it being their contention that the liability in respect of which judgment was obtained on the 29th May 1961 against Yong Choy was one which was covered by the terms of the policy effected by Ho Nee San.

The relevant term appears in Section II of the policy and reads as follows:

"3. In terms of and subject to the limitations of the indemnity which is granted by this Section to the Insured the Company will indemnify any person who is driving such Motor Car on the Insured's order or with his permission provided that such person

(a) is not entitled to indemnity under any other Policy

(b) shall as though he were the Insured observe fulfil and be subject to the terms exceptions and conditions of this Policy in so far as they can apply

(c) holds a licence to drive such Motor Car or has held and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf for holding or obtaining such a licence."

It is common ground that Yong Choy was not entitled to indemnity under any other policy and that he held a licence to drive the car and was not disqualified for holding such a licence. It is also common ground that he was not driving on Ho Nee San's order and that no express permission had been given by Ho Nee San for him to drive the car. The question to be determined is therefore whether he was driving the car with the implied permission of Ho Nee San.

Yong Choy was called as a witness and his evidence may be summarised as follows. He is a younger brother of the first plaintiff. Previous to the accident he had borrowed Ho Nee San's car on three or four occasions. On some of these occasions as Ho Nee San was not in his shop, he had borrowed the car after speaking to Ho Nee San's friend who was working in the same shop. He was a personal friend of Ho Nee San, having known him for about five or six years. They had had tea or coffee together, just the two of them. On the morning of the 6th October 1957 Woo Eng Chuan drove Ho Nee San's car to Yong Choy's house. The wedding of Woo Eng Chuan's younger brother was going to be celebrated at Segamat and Woo Eng Chuan had borrowed Ho Nee San's car in order to take his relatives to attend the wedding. They expected to be away from Singapore for about three days. Wee Eng Chuan drove the car in the direction of Segamat with Yong Choy, the latter's brothers and mother and a friend in it. When they reached Kulai, Woo Eng Chuan complained that he had a headache and asked Yong Choy to take over the driving wheel. Yong Choy then drove the car and it was during this part of the journey that the car overturned, thereby causing the death of Woo Eng Chuan.

Ho Nee San gave evidence to the following effect. He knew Yong Choy well and had often been together with him. Yong Choy had borrowed his car on many occasions before the date of the accident. But he had not been told either by Yong Choy or anybody else that Yong Choy had used his car in his absence. In cross-examination he stated that he had lent his car

to Yong Choy on a few occasions, at least three or four, or four or five times. About a week before the date of the accident Woo Eng Chuan, who was his cousin, came to see him to make arrangements for the loan of the car. Woo Eng Chuan told him that his brother was getting married at Segamat and he wanted to borrow the car for a few days. Wee Eng Chuan also told him that he was going with his mother-in-law and brothers-in-law, viz. Yong Choy, Yong Toong and Yong Fah. Ho Nee San agreed to lend the car to Woo Eng Chuan. But neither of them said anything as to who was or who was not to drive the car. On the morning of the 6th October 1957 Woo Eng Chuan came and drove the car away. Later that day Ho Nee San heard about the accident and on the 9th October 1957 went to the defendants' office where he reported the matter. On the 10th October 1957 he was taken to the defendants' solicitors' office where a statement made by him was recorded.

The statement to which I have just referred is a document of some importance, as it was used in cross-examination for the purpose of contradicting Ho Nee San. I am satisfied from the evidence of the two clerks who were called to prove the statement that it contains an accurate record of what Ho Nee San said in the defendants' solicitors' office on the 10th October 1957.

The following are relevant passages from the statement:—

"I am not a personal friend of Mr. Yong Choy. He came to my house on one or two occasions together with Mr. Foo.

I have never been together with Yong Choy in attending to parties or social functions but have on one or two occasions had cups of tea in coffee shops in the company of Mr. Foo.

Prior to the accident I never knew whether Yong Choy had a driving licence or not.

Yong Choy had never approached me for the loan of the car.

I would not have lent my car to him if he had approached me for the loan of the same.

I was all along under the impression that Mr. Foo would be driving the car himself.

I take pride in my car and I am careful about whom I permit to drive the car.

I had no idea that Mr. Yong Choy would be accompanying Mr. Foo on the trip. Mr. Foo mentioned to me that he was going with relatives but he did not mention to me any specific names

If I had known that Yong Choy would be asked to drive the car I would have objected to it.

It is a pity that Mr. Foo had died in the accident. If he had not died I would have reprimanded him when I next see him for allowing someone else to drive the car.

In conclusion I will say that the handing over of the wheel to Yong Choy was done without my knowledge or consent."

The statement is of course not evidence of the facts contained in it and is admissible only for the purpose of impeaching the credit of Ho Nee San. Before considering the effect of this statement it should be noted that on the 8th September 1960, at the first plaintiff's request, Ho Nee San went to her solicitors' office where he made another statement which flatly contradicted many of the passages in the statement made on the 10th October 1957. In my opinion, the effect of all this is to show that Ho Nee San is a thoroughly unreliable witness.

The conclusions of fact which I have reached, apart from the facts as to which there is common ground between the parties, are as follows. First, Ho Nee San never lent his car to Yong Choy before the date of the accident. I did not believe Yong Choy's evidence on this point. In my opinion he was telling falsehoods in order to assist the first plaintiff, who is his sister. Secondly, Ho Nee San did not know exactly who would be accompanying Woo Eng Chuan to Segamat. In particular he did not know for a fact that Yong Choy would be travelling in the same car. All he knew was that Woo Eng Chuan was taking some relatives with him.

Counsel for the plaintiffs contends that there was an unconditional bailment of the car to Woo Eng Chuan, and that Ho Nee San thereby abandoned his right of control over the car. In putting forward this argument he relies on the case of *Lee Chong* v. *Tan Kwee Low* [1]. It is to be observed that a very different point was under consideration in that case. The question was whether the second defendant in that case was acting as the servant or agent of the first defendant when he drove the latter's car. In my opinion, counsel for the plaintiffs cannot rely on that case to support the proposition that when an owner lends a car to another person the borrower can then allow anyone in the world to drive the car and claim that the car is being driven with the owner's implied permission.

There must be many instances of car-owners lending their cars without imposing any conditions on the borrowers as to who should or should not drive the cars. In a large number of such cases the borrowers allow third persons to drive the cars without obtaining the express permission of the owners. The circumstances in which cars are lent and made use of in this manner are almost infinite in their variety. It is probably impossible to state in comprehensive terms any principle which will enable it to be determined in every case whether implied permission has been given to the third persons to drive the cars.

The determination of that question depends upon the view that is taken of the matter after consideration of the circumstances of each case.

In my judgment, on the facts of the present case, it cannot be said that the car was being driven by Yong Choy with Ho Nee San's implied permission. As no express permission was given, the car was driven by Yong Choy without any permission whatsoever from Ho Nee San. In the result the defendants are not liable to pay the sum claimed by the plaintiffs and there must be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors:—*Donaldson & Burkinshaw*; *Battenberg & Talma.*

THE KAMPONG KUANTAN RUBBER CO. LTD. v. V.K.G. MENON

[O.C.J. (Gill J.) August 5, 1963]

[K.L. — Civil Suit No. 34 of 1960]

Practice and procedure—Service out of jurisdiction—Order granting leave to issue writ—Affidavit in support not stating that plaintiff had good cause of action—R.S.C. 1957, O.11 r.4—Whether order vitiated by defect.

Practice and procedure—Service out of jurisdiction—May be served on defendant when he comes within jurisdiction—Service on agent—No irregularity.

An order granting leave to issue a writ for service out of the jurisdiction will be set aside if the affidavit in support of the application does not state that the deponent believes that the plaintiff has a good cause of action as required by R.S.C. O.11 r.4. *Vaudrey & Ors.* v. *Nathan* (3) followed.

Observations on when writ for service out of jurisdiction may be served within jurisdiction.

Cases referred to:—

(1) *Kinahan* v. *Kinahan* (1890) 45 Ch. D. 78.

(2) *Dickson* v. *Law and Davidson* [1895] 2 Ch. 62, 65.

(3) *Vaudrey & Ors.* v. *Nathan* [1928] W.N. 154.

(4) *Ban Aik & Co.* v. *K. U. Chuan* [1934] M.L.J. 119.

(5) *Western Suburban & Notting Hill Permanent Benefit Building Society* v. *Rucklidge* [1905] 2 Ch. 472.

MOTION.

Athi Nahappan for defendant/applicant.

S. D. K. Peddie for plaintiff/respondent.

Cur. Adv. Vult.

Gill J.: This is a motion by the defendant to discharge the order granting leave to issue the writ in these proceedings for service outside the jurisdiction and/or to set aside the writ and/or to discharge the order for substituted service of the amended writ and/or to set aside the service of the amended writ.

The brief history of the proceedings in this suit is as follows. On an application filed on 5th February, 1960 by way of summons in Chambers an order was made on 16th February, 1960 granting leave to the plaintiff to issue a writ against the defendant and to serve a notice of writ on him in India. The writ was renewed from time to time, the last of such renewals being made under an order dated 9th August, 1962. The writ as well as the notice of writ and the statement of claim was amended on a fiat to amend dated the 18th June, 1962. On 9th August, 1962 an order was made for service of the amended writ or the amended notice of writ on Mr. Athi Nahappan of Messrs. Athi Nahappan & Co., Advocates and Solicitors, Kuala Lumpur. A copy of this order together with a copy of the amended writ and a copy of the amended statement of claim were duly served on Mr. Athi Nahappan on 29th January, 1963.

The application for the order granting leave to issue the writ was supported by the affidavit of Donald Eric Teale, the Director/Secretary of the local agents of the plaintiff company. In paragraph 4 of this affidavit dated the 4th February, 1960 it was stated as follows:—

"The intended defendant had fraudulently used and converted to his own use the intended plaintiff's money to the extent of $4,661.39 whilst employed as Chief Clerk as stated in paragraph 3 above."

The affidavit did not state that in the belief of the deponent the plaintiff had a good cause of action, as required by Order 11 Rule 4 of the Rules of the Supreme Court, 1957. The question is whether this failure to comply with the provisions of Order 11 Rule 4 vitiates the order granting leave to issue the writ for service outside the jurisdiction.

It is to be observed that our Order 11 Rule 4 is identical with Order 11 Rule 4 of the English Rules of the Supreme Court. English authorities seem to differ as to the effect of the omission to testify to a good cause of action. In *Kinahan* v. *Kinahan,*(1) where the action was for an infringement of the plaintiffs' trade mark, an order obtained *ex-parte* by the plaintiffs, under Rules of the Supreme Court, 1883, giving them leave to issue and serve the writ in Ireland was discharged on the ground that the action was to be regarded as practically an Irish and not an English action. Kekewich J. had this to say as regards the omission to testify to a good cause of action:—

"There is a statement which may be and was in fact accepted as an equivalent, namely, that the Defendants